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6 **UNITED STATES DISTRICT COURT**  
7 **WESTERN DISTRICT OF WASHINGTON**  
8 **AT SEATTLE**

9 MICHELE LOUISE COSGROVE,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of  
Social Security,

13 Defendant.

NO. C11-885-JLR-JPD

REPORT AND  
RECOMMENDATION

14 Plaintiff Michele Louise Cosgrove appeals the final decision of the Commissioner of  
15 the Social Security Administration (“Commissioner”) which denied her applications for  
16 Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§  
17 401-33, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth  
18 below, the Court recommends that the Commissioner’s decision be reversed and remanded for  
19 further proceedings.

20 I. FACTS AND PROCEDURAL HISTORY

21 At the time of the administrative hearing, Plaintiff was a 43 year old woman with a  
22 high school education and a Novell technology certificate. Administrative Record (“AR”) at  
23 22, 277. Her past work experience includes employment as a network control supervisor and  
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1 as a display fabricator. AR at 21. Plaintiff was last gainfully employed in December 2000.  
2 AR at 178.

3 On February 28, 2006, Plaintiff filed an application for DIB, alleging an onset date of  
4 August 5, 2002. AR at 14. Plaintiff asserts that she is disabled due to seizures, fractured skull,  
5 short-term memory loss, depression, and Restless Leg Syndrome (“RLS”). AR at 96.

6 The Commissioner denied plaintiff’s claim initially and on reconsideration. AR at 96-  
7 98, 101-102. Plaintiff requested a hearing which took place on March 20, 2009. AR at 34.  
8 On September 1, 2009, the ALJ issued a decision finding plaintiff not disabled and denied  
9 benefits based on her finding that plaintiff could perform a specific job existing in significant  
10 numbers in the national economy. AR at 31. Plaintiff’s administrative appeal of the ALJ’s  
11 decision was denied by the Appeals Council, AR at 3-5, making the ALJ’s ruling the “final  
12 decision” of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On May 26,  
13 2011, Plaintiff timely filed the present action challenging the Commissioner’s decision. Dkt.  
14 No. 1.

## 15 II. JURISDICTION

16 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§  
17 405(g) and 1383(c)(3).

## 18 III. STANDARD OF REVIEW

19 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of  
20 social security benefits when the ALJ’s findings are based on legal error or not supported by  
21 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
22 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is  
23 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
24 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750

1 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
2 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
3 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
4 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
5 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
6 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
7 must be upheld. *Id.*

8 The Court may direct an award of benefits where "the record has been fully developed  
9 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
10 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
11 (9th Cir. 1996)). The Court may find that this occurs when:

12 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
13 claimant's evidence; (2) there are no outstanding issues that must be resolved  
14 before a determination of disability can be made; and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

15 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
16 erroneously rejected evidence may be credited when all three elements are met).

#### 17 IV. EVALUATING DISABILITY

18 As the claimant, Ms. Cosgrove bears the burden of proving that she is disabled within  
19 the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
20 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
21 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
22 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
23 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments  
24 are of such severity that she is unable to do her previous work, and cannot, considering her age,

1 education, and work experience, engage in any other substantial gainful activity existing in the  
2 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
3 99 (9th Cir. 1999).

4 The Commissioner has established a five step sequential evaluation process for  
5 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
6 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
7 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
8 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
9 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
10 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
11 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
12 or more medically severe impairments, or combination of impairments, that limit her physical  
13 or mental ability to do basic work activities. If the claimant does not have such impairments,  
14 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
15 impairment, the Commissioner moves to step three to determine whether the impairment meets  
16 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
17 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
18 twelve-month duration requirement is disabled. *Id.*

19 When the claimant’s impairment neither meets nor equals one of the impairments listed  
20 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
21 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is able to perform her past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

#### V. DECISION BELOW

On September 1, 2009, the ALJ issued a decision finding the following:

1. The claimant meets the insured status requirements of the Social Security Act through March 31, 2006.
2. The claimant has not engaged in substantial gainful activity since August 5, 2002, the alleged onset date.
3. The claimant has the following severe impairments: seizure disorder, status post head injury; depression; restless leg syndrome; sleep apnea; alcohol dependence, and a possible amnesic disorder.
4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
5. After careful consideration of the entire record, the undersigned finds that, based on all of the impairments, including the substance use disorder, the claimant has a residual functional capacity without exertional limitations to perform a full range of work at all exertional levels but with the following nonexertional limitations: the claimant cannot climb ladders, ropes or scaffolds, work around heights, machinery or other hazards, and is limited to simple, routine work without public contact. The claimant also requires accommodations to learn by direction. The claimant cannot sustain an 8-hour workday or 40-hour workweek.
6. The claimant is unable to perform any past relevant work.

- 1 7. The claimant was born on XXXXX, 1966 and was 36 years old, which  
2 is defined as a younger individual age 18-49, on the alleged disability  
3 onset date.<sup>2</sup>
- 4 8. The claimant has at least a high school education and is able to  
5 communicate in English.
- 6 9. The claimant's acquired job skills do not transfer to other occupations  
7 within the residual functional capacity defined above.
- 8 10. Considering the claimant's age, education, work experience, and  
9 residual functional capacity, based on all of the impairments, including  
10 the substance use disorder, there are no jobs that exist in significant  
11 numbers in the national economy that the claimant can perform.
- 12 11. If the claimant stopped the substance use, the remaining limitations  
13 would cause more than a minimal impact on the claimant's ability to  
14 perform basic work activities; therefore, the claimant would continue  
15 to have a severe impairment or combination of impairments.
- 16 12. If the claimant stopped the substance use, the claimant would not have  
17 an impairment or combination of impairments that meets or medically  
18 equals any of the impairments listed in 20 CFR Part 404, Subpart P,  
19 Appendix 1.
- 20 13. If the claimant stopped the substance use, the claimant has a residual  
21 functional capacity without exertional imitations to perform a full  
22 range of work at all exertional levels but with the following  
23 nonexertional limitations: the claimant cannot climb ladders, ropes or  
24 scaffolds, work around heights, machinery or other hazards, and is  
limited to simple, routine work without public contact. The claimant  
also requires accommodations to learn by direction.
14. If the claimant stopped the substance use, the claimant would continue  
to be unable to perform past relevant work.
15. Transferability of job skills is not material to the determination of  
disability because using the Medical-Vocational Rules as a framework  
supports a finding that the claimant is "not disabled," whether or not  
the claimant has transferable job skills.
16. If the claimant stopped the substance use, considering the claimant's  
age, education, work experience, and residual functional capacity,  
there would be a significant number of jobs in the national economy  
that the claimant could perform.

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<sup>2</sup> The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

- 1           17.     Because the claimant would not be disabled if she stopped the  
2                    substance use, the claimant's substance use disorder is a contributing  
3                    factor material to the determination of disability. Thus, the claimant  
                    has not been disabled within the meaning of the Social Security Act, at  
                    any time from the alleged onset date through the date of this decision.

4     AR at 16-31.

## 5                                   VI.     ISSUES ON APPEAL

6           The principal issues on appeal are:

- 7           1.     Did the ALJ err at step two of the sequential evaluation by failing to find  
8                    plaintiff's dementia to be a severe impairment as found by examining physician  
                    Dr. Rodger Mainz and state agency consultants from Disability Determination  
                    Services (hereafter "DDS")?
- 9           2.     Did the ALJ fail in fully developing the record by failing to obtain necessary  
10                  testimony from a qualified medical expert before determining that substance  
                    abuse was a material factor contributing to her disability?
- 11          3.     Did the ALJ err by rejecting the medical opinion evidence of Dr. Mainz?
- 12          4.     Did the ALJ err by failing to reduce plaintiff's limitation in "staying on task" to  
13                  vocationally relevant terms for the vocational expert?

14     Dkt. No. 11 at 1 & 9.

## 15                                  VII.     DISCUSSION

### 16           A.     The ALJ Erred at Step Two of the Sequential Evaluation

17           Plaintiff argues that the ALJ erred in failing to address the dementia diagnoses of Drs.  
18     Rodger Mainz, David Jarvis, Cynthia Collinwood, and Kristine Harrison. The portion of the  
19     ALJ's decision identifying the Plaintiff's severe impairments does not mention dementia at all.  
20     See AR at 17. The ALJ expressly declined to consider the report of one of the providers (Dr.  
21     Harrison) who had recorded a dementia diagnosis, but the ALJ rejected the opinion only  
22     because it "relied on an incorrect date last insured for analyzing the claimant's allegations."  
23     AR at 29. Plaintiff argues that the ALJ erred in not referencing Plaintiff's multiple dementia  
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1 diagnoses in the step two analysis, and also erred in rejecting Dr. Harrison's opinion in its  
2 entirety.

3 1. *Step Two*

4 Step two of the sequential evaluation process requires a claimant to prove that he has a  
5 severe impairment or combination of impairments. 20 C.F.R. § 404.1520(c), 416.920(c). An  
6 impairment is severe if it significantly limits the plaintiff's ability to perform basic work  
7 activities.<sup>3</sup> 20 C.F.R. § 404.1521(a), 416.921(a). When an impairment or combination of  
8 impairments consist of no more than a slight abnormality that have only a minimal effect on an  
9 individual's ability to work, a finding of non-severe is appropriate. *Smolen*, 80 F.3d at 1290  
10 (internal citations omitted); *see also* SSR 96-3p, at \*1. Hence, step two acts as a "*de minimis*  
11 screening device to dispose of groundless claims." *Id.* Plaintiff has the burden of proving that  
12 her "impairments or their symptoms affect [his] ability to perform basic work activities."  
13 *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001); *Tidwell v. Apfel*, 161 F.3d 599,  
14 601 (9th Cir. 1998).

15 2. *Dementia*

16 After evaluating her on May 17, 2005, Dr. Mainz diagnosed Plaintiff with, *inter alia*,  
17 dementia due to head trauma. *See* AR at 340. Dr. Harrison and Dr. Collingwood, State agency  
18 psychologists, both opined that Plaintiff had, *inter alia*, the medically determinable impairment  
19 of "history of dementia secondary to head injury and seizures." *See* AR at 457, 565.  
20 Nonetheless, the ALJ's decision does not mention the dementia diagnoses at all in the section  
21 addressing Plaintiff's impairments, but instead lists Plaintiff's impairments as "seizure  
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23 <sup>3</sup> Basic work activities include the abilities and aptitudes necessary to do most jobs  
24 including walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling,  
seeing, hearing, understanding, carrying out and remembering simple instructions, and dealing  
with changes in a routine work setting. *See* 20 C.F.R. §§ 404.1521(b), 416.921(b).



1 disorder, status post head injury; depression; restless leg syndrome; sleep apnea; alcohol  
2 dependence, and a possible amnestic disorder[.]” See AR at 17. Plaintiff argues that the  
3 ALJ’s failure to list dementia among the list of her severe impairments was error, because  
4 dementia “by definition carries with it the attendant limitation of severe cognitive  
5 impairments.” Pltf.’s Reply (Dkt. 15) at 3.

6 According to the Defendant, the ALJ’s failure to list dementia in the list of Plaintiff’s  
7 severe impairments is harmless, because the ALJ properly considered the limitations imposed  
8 by Plaintiff’s dementia at other steps of the sequential process. The Defendant argues that  
9 “The ALJ accommodated Plaintiff’s mental impairments by limiting her to simple, routine  
10 work that could be learned by demonstration rather than by auditory instructions to account for  
11 her short-term memory loss.” Def.’s Opp’n at 14:15-17.

12 But by the ALJ’s own language, it was only Plaintiff’s “short-term memory loss” that  
13 was accommodated by limiting Plaintiff to simple, routine work that could be learned by  
14 demonstration. Given that the ALJ’s decision does not reference dementia at all, and does not  
15 explain why the multiple, uncontradicted diagnoses of dementia in the record were not credited  
16 by the ALJ, the Court agrees with Plaintiff that the ALJ erred in not articulating specific and  
17 legitimate reasons for rejecting Plaintiff’s diagnoses of dementia. See *Bayliss v. Barnhart*, 427  
18 427 F.3d 1211, 1216 (9th Cir. 2005).

19 Thus, the Court finds that the ALJ erred at step two, in not explaining the omission of  
20 dementia from the list of Plaintiff’s impairments, and the Court will remand for a *de novo*  
21 hearing. On remand, the ALJ shall properly evaluate and document her analysis of Plaintiff’s  
22 claim of dementia.<sup>4</sup> The ALJ shall also reassess Plaintiff’s RFC, because the ALJ’s failure to

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24 <sup>4</sup> The Court also agrees with Plaintiff that the ALJ improperly discredited Dr.  
Harrison’s opinion due to an erroneous date last insured listed on the report. The date Dr.

1 properly evaluate the medical evidence of dementia prevents the Court from determining, on  
2 the record as it currently exists, whether the ALJ's RFC assessment is adequate.

3 B. The ALJ Did Not Err in Evaluating the Medical Expert Testimony of Lew B.  
4 Myers, M.D.

5 Neurologist Lew B. Myers testified at Plaintiff's hearing at the ALJ's request and  
6 testified, *inter alia*, that Plaintiff's depression was significant enough to meet a listed  
7 impairment. The ALJ accorded great weight to Dr. Myers' opinion regarding Plaintiff's  
8 seizure disorder, but rejected his opinion regarding Plaintiff's depression:

9 As for the opinion evidence, [Dr. Myers'] testimony concerning the materiality  
10 of the claimant's substance abuse to the claimant's functionality in terms of the  
11 seizure disorder is given great weight and adopted. The opinion is well  
12 supported by the evidence of record and the medical expert's expertise.  
13 However, his testimony that the claimant's depression was significant enough to  
14 meet a [listing] is rejected. This opinion is beyond his expertise and [] entirely  
15 inconsistent with the record, the opinions of the State agency psychologists, and  
16 other examining psychologists and psychiatrists. The medical expert's lack of  
17 familiarity with listings analysis of mental impairments is eviden[t] in his  
18 assessment that the claimant had marked restrictions in all domains of the B  
19 criteria in such a case where the claimant is able to care for a family and get  
20 along with others.

21 AR at 27-28.

22 According to Plaintiff, the ALJ should have called a medical expert qualified to testify  
23 about Plaintiff's depressive disorder, and because Dr. Myers was not qualified to do so, the  
24 ALJ failed to fully develop the record.

The Court disagrees with Plaintiff's argument. The ALJ is obligated to supplement the  
record with medical testimony if the evidence is ambiguous, if the ALJ finds that the record is  
inadequate, or if the ALJ relies on an expert opinion that the evidence is ambiguous. *See Webb*

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Harrison cited was four months prior to the correct date, and the ALJ failed to explain why the  
fact that Dr. Harrison considered a slightly too-long window of time would render her entire  
opinion useless. Thus, on remand, the ALJ shall consider Dr. Harrison's report for any  
relevant purpose.

1 v. *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). The ALJ called Dr. Myers to testify about  
2 Plaintiff's seizure disorder, which was a neurological topic within his area of expertise as a  
3 neurologist. *See* AR at 40-41 (describing Dr. Myers' qualifications). Though the ALJ allowed  
4 Dr. Myers to also opine regarding Plaintiff's depression in response to questions from  
5 Plaintiff's attorney, Dr. Myers warned at the beginning of that testimony that "I am not a  
6 psychiatrist, but . . ." AR at 56. Thus, the transcript of the hearing does not suggest that the  
7 ALJ called Dr. Myers in order to solicit his evaluation of the severity of Plaintiff's depression.

8 Nor does the record suggest that such supplementation regarding Plaintiff's depression  
9 was necessary, given that Plaintiff's depression was evaluated by multiple providers, including  
10 Dr. Mashburn, Dr. Mainz, Dr. Jarvis, Dr. Harrison, and Dr. Collingwood. *See* AR at 28-29  
11 (summarizing the psychological evidence in the record). Though the ALJ ultimately credited  
12 different aspects of those treating providers' opinions and discounted some of them, at no point  
13 during the hearing or in the decision did the ALJ suggest that the record was inadequate or  
14 ambiguous as to Plaintiff's depression. Thus, the Court finds that the ALJ did not err in failing  
15 to supplement the record regarding Plaintiff's depression. *See Mayes v. Massanari*, 276 F.3d  
16 452, 456 (9th Cir. 2001) (the ALJ's "duty to develop the record further is triggered only when  
17 there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of  
18 the evidence").

19 C. The ALJ Did Not Err in Rejecting the Medical Opinion Evidence of Rodger  
20 Mainz, Ph.D.

21 Plaintiff contends that the ALJ erred in discounting the opinion of Dr. Mainz, who  
22 evaluated Plaintiff in May 2005 to assess her short-term memory loss related to her seizure  
23 disorder. Dr. Mainz opined:

24 Clearly, Ms. Cosgrove has marked disturbances in affective regulation that  
would impede her ability to absorb additional stressors of a work-related nature

1 without decompensating. There is also concern about her ability to remember  
2 instructions except in the most remedial of work, like unskilled manual work,  
3 which would be contraindicated, given her complaints that she is unsteady on  
4 her feet and in fact sustains falls which result in rather substantial injury not  
5 only due to falls that occur when she has a seizure but also when she just feels  
6 unsteady on her feet.

7 AR at 341. The ALJ discredited this particular opinion because at the time that Dr. Mainz  
8 evaluated Plaintiff, she “was not honest about the nature of her alcohol use.” AR at 29. Dr.  
9 Mainz’s report described Plaintiff’s alcohol use as follows:

10 [After her injury, Plaintiff] medicated herself with alcohol, drinking up to three  
11 or four glasses of Chardonnay a night. She did this until about six or seven  
12 months ago, when she discovered that it wasn’t working. The alcohol helped  
13 her tune everything out, but it also helped her tune out her children, which she  
14 just couldn’t tolerate. Her children are everything to her, she related. When  
15 asked if she was inebriated when she went to Dr. Mashburn’s session, Ms.  
16 Cosgrove related that she wasn’t. She adamantly denied that she ever drank  
17 before going for a doctor’s visit. She has not gone through treatment. She  
18 denied that she currently uses. Her clinical report must be taken with the  
19 customary reservation, but it did seem genuine.

20 AR at 339. The Defendant contends that the ALJ was entitled to discount Dr. Mainz’s opinion  
21 to the extent it was based Plaintiff’s dishonesty. *See* Def.’s Br. (Dkt. 14) at 12.

22 Substantial evidence in the record suggests that Plaintiff was dishonest about her  
23 alcohol use during her evaluation with Dr. Mainz and others. In addition to Dr. Mashburn’s  
24 observations of Plaintiff smelling of alcohol during his 2003 evaluation, Plaintiff was observed  
to have a “strong odor of alcohol on [her] breath” when she appeared in the emergency room in  
April 2003. AR at 370. Plaintiff minimized her drinking, which the physician found to be  
inconsistent with the odor. *Id.*

In January 2005, Plaintiff “denie[d] significant use of alcohol.” AR at 398. In  
September 2005, Plaintiff told a physician that she stopped drinking six months before, and up  
to that point she had been drinking “a bottle of wine a day or more.” AR at 390. The  
physician expressed some doubt as to whether Plaintiff had really been sober for six months,

1 given her liver disease. *See id.* The next month, Plaintiff admitted to that physician that she  
2 had been drinking. *See* AR at 387.

3 Dr. Jarvis also suspected that Plaintiff was continuing to drink alcohol, even though she  
4 denied use during her June 2006 evaluation. *See* AR at 453. Furthermore, Plaintiff's husband  
5 testified at the hearing that before March 2006 Plaintiff drank alcohol somewhat frequently (no  
6 "dry months" in a year), and that her drinking frequency increased since 2002. AR at 80.

7 These conflicting self-reports of Plaintiff's alcohol use are substantial evidence to  
8 support the ALJ's limited rejection of Dr. Mainz's opinion. *See Lester v. Chater*, 81 F.3d 821,  
9 830-31 (9th Cir. 1995) ("[T]he opinion of an examining doctor, even if contradicted by another  
10 doctor, can only be rejected for specific and legitimate reasons that are supported by  
11 substantial evidence in the record."). Thus, the Court finds that the ALJ did not err in rejecting  
12 Dr. Mainz's opinion to the extent that it was based on Plaintiff's dishonest representations  
13 regarding her alcohol use.

14 D. The ALJ Erred in Assessing Plaintiff's Limitation in "Staying on Task" as it  
15 relates to Plaintiff's RFC

16 When analyzing whether Plaintiff's impairments (assuming no alcohol abuse) met or  
17 equaled a Listing, the ALJ analyzed *inter alia* the Paragraph B criteria, one of which is  
18 restrictions to concentration, persistence or pace:

19 With regard to concentration, persistence or pace, the claimant would have  
20 moderate difficulties if the substance use was stopped. Due to the claimant's  
21 possible amnesic disorder, assessed under listing 12.02, and certain effects of  
the depressive disorder, the claimant's ability in this area would not be expected  
to improve greatly and she would still have moderate difficulties with  
instructions and staying on task.

22 AR at 23. The ALJ subsequently found that, assuming Plaintiff stopped abusing alcohol,  
23 Plaintiff would have

1 a residual functional capacity without exertional limitations to perform a full  
2 range of work at all exertional levels but with the following nonexertional  
3 limitations: the claimant cannot climb ladders, ropes or scaffolds, work around  
4 heights, machinery or other hazards, and is limited to simple, routine work  
5 without public contact. The claimant also requires accommodations to learn by  
6 direction.

7 AR at 24. The Plaintiff contends that the ALJ erred by not addressing Plaintiff's limited ability  
8 to stay on task in the RFC assessment, even though she considered it when analyzing the  
9 Paragraph B criteria. The Defendant argues that the ALJ's RFC assessment was consistent  
10 with the evidence of record, including Dr. Collingwood's opinion that Plaintiff "should be able  
11 to persist on simple tasks for two-hour periods throughout the day." AR at 580. According to  
12 Defendant, it was not necessary for the ALJ to address in her RFC assessment Plaintiff's  
13 inability to stay on task for longer than two hours because "[n]ormal workdays include breaks  
14 after two-hour periods." Def.'s Br. (Dkt. 14) at 14.


15 The Defendant cites no authority to support the assumption that "normal workdays"  
16 include breaks every two hours, and there is no evidence in the record that the ALJ's RFC  
17 assessment relied on that assumption. Neither does the ALJ's RFC assessment account for  
18 Plaintiff's "moderate difficulties with . . . staying on task," as the ALJ herself had found.  
19 *Compare* AR at 23 *with* AR at 24. The ALJ did not reference Plaintiff's ability to concentrate  
20 or stay on task, when asking the vocational expert about a hypothetical person with Claimant's  
21 limitations. *See* AR at 87-88. This failure is error, because "[h]ypothetical questions posed to  
22 the vocational expert must set out *all* the limitations and restrictions of the particular  
23 claimant[.]" *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988) (emphasis in original).  
24 Thus, because the ALJ found Plaintiff to have moderate limitations in staying on task, and yet  
did not include that limitation in her hypothetical question to the vocational expert, the ALJ's

1 RFC assessment is inadequate. On remand, the ALJ shall address the Plaintiff's "staying on  
2 task" limitation when soliciting testimony from a vocational expert.

3 VIII. CONCLUSION

4 For the foregoing reasons, the Court recommends that this case be REVERSED and  
5 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's  
6 instructions. A proposed order accompanies this Report and Recommendation.

7 DATED this 21st day of March, 2012.

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9 JAMES P. DONOHUE  
10 United States Magistrate Judge  
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